

Agenda

Item #6



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commission Members

From: Jonathan Wayne, Executive Director

Date: March 18, 2009

Re: Second Adoption of Rule Change to Permit Gubernatorial Candidates to Collect \$150,000 in Seed Money Contributions

Thank you for your consideration of rules proposed by the Commission staff.

At your December 29, 2008 meeting, you voted to adopt a change to Chapter 3, Section 2(3)(B)(1)(a) of the Commission's rules permitting candidates for Governor seeking Maine Clean Election Act funding to collect up to \$150,000 in seed money contributions prior to receiving public funding. Unfortunately, I need to recommend that you adopt the rule change for a second time at your March 26th meeting in order to cure a technical problem with the December 29, 2008 adoption that is discussed on the next page.

I have spoken with Danielle Fox, the analyst for the Joint Standing Committee on Legal and Veterans' Affairs. She believes that the committee will have sufficient time to consider the rule change in April. In fact, the Committee has not yet received an anticipated bill sponsored by House Speaker Hannah Pingree that contains a related provision proposing to increase the seed money maximum to \$300,000.

I have attached:

- the text of the rule change you voted to provisionally adopt on December 29, 2008
- pages 1 and 4 of the minutes of the December 29, 2009 meeting
- the amended regulatory agenda submitted to the Secretary of State and Legislature on March 11, 2009, which remedies the problem

I apologize for my misunderstanding of the rule-making process that makes the adoption on March 26th necessary. Thank you.

Technical Problem with December 29, 2008 Adoption

The Commission's counsel, Phyllis Gardiner, has advised me that her office is unable to certify the legality of the seed money rule-making because the rule change was not included in an annual regulatory agenda that the Commission staff had submitted to the Secretary of State and the Legislature on July 22, 2008. Under 5 M.R.S.A. § 8060(1)(A), state boards are required to submit an annual regulatory agenda that includes "[a] list of rules that the agency expects to propose prior to the next regulatory agenda due date." The agenda is intended to provide the board's legislative oversight committee with a statement of the board's intended rule-making plans for the coming year.

I was unaware that a separate section of statute (5 M.R.S.A. § 8064) prohibits a board from adopting a rule if it was not included in its most recent regulatory agenda. That prohibition is not mentioned in the Guide to Rule-Making published by the Secretary of State that I have been using as a reference.

For your information, whenever the Commission begins a rule-making process, the staff always includes the members of the Joint Standing Committee on Legal and Veterans' Affairs in the mailing list of interested persons. So, the members of the Commission's oversight committee in 2008 had ample notice that the Commission was considering a rule change to increase the seed money maximum. Also, the seed money rule change is major substantive, which means that the Legislature will have an additional opportunity to consider the rule change.

After consulting with Phyllis Gardiner about solutions to the problem, I submitted an amended regulatory agenda to the Secretary of State and Legislature on March 11, 2009 that included the \$150,000 rule amendment. Phyllis Gardiner believes that if you adopt the rule change on March 26th, her office will be able to certify that the rule meets the requirements of the Administrative Procedure Act.

Chapter 3: MAINE CLEAN ELECTION ACT AND RELATED PROVISIONS

SECTION 2(3) . Seed Money Restrictions

- A. **General.** After becoming a candidate and before certification, a participating candidate may collect and spend only seed money contributions. The restrictions on seed money contributions apply to both cash and in-kind contributions.
- B. **Total Amount**
- (1) A participating candidate must limit the candidate's total seed money contributions to the following amounts:
 - (a) one hundred fifty thousand dollars for a gubernatorial candidate;
 - (b) one thousand five hundred dollars for a candidate for the State Senate; or
 - (c) five hundred dollars for a candidate for the State House of Representatives.
 - (2) Notwithstanding any other provision of this chapter, a candidate may carry forward to a new candidacy of that candidate campaign equipment or property, subject to the reporting requirements of Title 21-A, chapter 13 [Campaign Reports and Finances].
 - (3) The Commission periodically will review these limitations and, through rulemaking, revise these amounts to ensure effective implementation of the Act.
- C. **Campaign surplus.** A candidate who has carried forward campaign surplus according to Title 21-A, chapter 13, subchapter II [§1017(8) and §1017(9)], and who intends to become a participating candidate, must dispose of campaign surplus in accordance with the requirements of Title 21-A, chapter 13, subchapter II [§1017(8)]; provided, however, that a candidate may carry forward only those portions of campaign surplus that comply with the provisions of this Act regarding seed money contributions [§§ 1122(9) and 1125(2)]. Any campaign surplus (excluding campaign equipment or property) carried forward under this provision will be counted toward that candidate's total seed money limit.

INFORMATIONAL NOTE: The Commission will provide educational materials to all former candidates who have a campaign surplus describing the requirement that individuals must dispose of campaign surplus to remain eligible for participation as a Maine Clean Election Act candidate.

- D. **Return of Contributions Not in Compliance with Seed Money Restrictions.** A participating candidate who receives a contribution exceeding the seed money

per donor restriction or the total amount restriction must immediately return the contribution and may not cash, deposit, or otherwise use the contribution.

- E. **Case-by-Case Exception.** A participating candidate who has accepted contributions or made expenditures that do not comply with seed money restrictions may petition the Commission to remain eligible for certification as a Maine Clean Election Act candidate. The Commission may approve the petition and restore a candidate's eligibility for certification if the candidate successfully establishes all of the following criteria:
- (1) the failure to comply was the result of an unintentional error;
 - (2) the candidate immediately returned all contributions that did not comply with seed money restrictions or paid for goods or services contributed that did not comply with seed money restrictions;
 - (3) the candidate petitioned the Commission promptly upon becoming aware of the unintentional error; and
 - (4) the failure to comply did not involve expenditures by the participating candidate significantly in excess of seed money total amount restrictions or otherwise constitute systematic or significant infractions of seed money restrictions.
- F. After becoming a candidate and prior to certification, accepting a loan from any source including a financial institution and spending money received in the form of a loan, are violations of the seed money restrictions of the Act.
- G. **Other.** A seed money contributor may also make a qualifying contribution to the same participating candidate provided that the contributor otherwise meets the requirements for making a qualifying contribution.



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Minutes of the December 29, 2008, Meeting of the
Commission on Governmental Ethics and Election Practices
Held in the PUC Hearing Room, PUC Building,
242 State Street, Augusta, Maine

Present: Hon. Edward M. Youngblood, Acting Chair; Hon. Francis C. Marsano (by phone); Walter F. McKee, Esq.; and Hon. Mavourneen Thompson. Staff: Executive Director Jonathan Wayne and Phyllis Gardiner, Counsel.

Mr. Youngblood was nominated by Ms. Thompson to chair today's meeting. Mr. McKee seconded the nomination. The nomination was approved.

At 9:03 a.m., Acting Chair Edward Youngblood convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the October 27, 2008 Meeting

Mr. Marsano moved to accept the October 27, 2008, meeting minutes as amended. Ms. Thompson seconded. The motion passed unanimously (4-0).

Mr. McKee recused himself from the discussion of this agenda item since his mother-in-law serves as a lobbyist for this organization and he knows Cindy Butts personally.

Agenda Item #2. Late Independent Expenditure Report by the Maine Association of Realtors PAC

Mr. Wayne explained that the Maine Association of Realtors PAC was required to file an independent expenditure report on Saturday, October 11, 2008, disclosing expenditures made to support Senate candidates Lois Snowe-Mello and Christopher Rector. Instead, the PAC filed the report 20 days late on Friday, October 31, 2008. The PAC paid a routine penalty of \$1,231.20. The late filing of the report delayed the payment of matching funds to Senate candidates Deborah Simpson in the amount of \$3,186 and

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Agenda Item #3. Provisional Adoption of Rule Amendment Regarding Seed Money Maximum

Mr. Wayne said that, at its July meeting, the Commission agreed to accept public comment on a proposed rule change to increase the maximum amount of seed money that a gubernatorial candidate seeking Maine Clean Election Act funding can collect from \$50,000 to \$100,000. After further research, the staff suggested that the amount be increased to \$150,000 and the Commission agreed at its October 27 meeting to accept public comment on increasing the seed money maximum to \$150,000. On November 24, the Commission held a public hearing to receive comments on the \$150,000 proposal. He said the Commission can now decide whether to increase the seed money maximum to \$100,000 or \$150,000. Because this would be a change to a major substantive rule, it would need to be submitted to the Legislature for its consideration.

Mr. McKee stated he would support the increase to \$150,000 and questioned what the next procedure is at this point.

Ms. Gardiner stated that the public comment period has ended, so the next administrative step would be for the Commission to provisionally adopt a final rule which would then be reviewed by the Legislature.

Mr. McKee moved to provisionally adopt the final rule changing the seed money maximum amount to \$150,000. Mr. Marsano seconded.

Mr. McKee said this change is modest and makes sense in order to attract the most qualified candidates and give campaigns the best opportunity to compete at the gubernatorial level.

Mr. Youngblood agreed and said this issue will most likely need to be addressed again in the future.

Ms. Thompson said this change should increase participation of gubernatorial candidates and reduce the special interest money in these campaigns.

The motion passed unanimously (4-0).



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March 11, 2009

Don Wismer
Secretary of State's Office
101 State House Station
Augusta, Maine 04333

Dear Mr. Wismer:

Enclosed please find an amended regulatory agenda for 2008- 2009 for the Maine Commission on Governmental Ethics and Election Practices. By copy of this letter, I am providing 20 copies to the Executive Director of the Legislative Council.

Please telephone me at 287-4179 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan Wayne".

Jonathan Wayne
Executive Director

cc: David E. Boulter, Executive Director of the Legislative Council (20 copies)
Danielle Fox, Office of Policy and Legal Analysis
Assistant Attorney General Phyllis Gardiner

Maine Administrative Procedure Act
2008-2009 Regulatory Agenda – Amended March 11, 2009
Commission on Governmental Ethics and Election Practices

1. Agency Umbrella-Unit Number: 94-270
2. Agency Name: Commission on Governmental Ethics and Election Practices
3. Contact Person: Jonathan Wayne, Executive Director
4. Emergency Rules Adopted Since the Last Regulatory Agenda: None
5. 2008-2009 Rule-making Activity:

CHAPTER 1: Procedures

STATUTORY AUTHORITY: 1 M.R.S.A. § 1003(1); 21-A M.R.S.A. § 1017(6); 21-A M.R.S.A. §1019-B.

PURPOSE: To permit the Commission to consider any reported loan to be a cash contribution if it remains unpaid for four years after the election in which it was incurred; to clarify that party committees must make a reasonable effort to obtain and report employment information about their contributors; to require the Commission to determine whether a debt owed by a candidate or committee to a vendor which remains unpaid for more than four years after the election in which it was incurred is a contribution; and to delete the filing schedule for ballot question committees in the Commission's rules in favor of inserting the schedule in statute.

The Chapter 1 rules may be amended to be consistent with statutory changes enacted in the First Regular Session of the 124th Legislature. If necessary, the Commission may propose additional amendments to improve administration or to clarify existing procedures.

EXPECTED SCHEDULE FOR ADOPTION: No later than May 2009.

AFFECTED PARTIES: Political candidates, political action committees, political party committees, ballot question committees, contributors to campaigns, lobbyists, and Legislators.

CONSENSUS-BASED RULE DEVELOPMENT: None expected.

CHAPTER 3: Maine Clean Election Act and Related Provisions

STATUTORY AUTHORITY: 1 M.R.S.A. § 1003; 21-A M.R.S.A. § 1126

PURPOSE: To clarify that the Commission may use its judgment regarding whether independent expenditures were made in support or in opposition to a candidate when awarding

* matching funds; to require candidates who receive matching funds for the primary election to return unspent funds after a successful primary; to increase the amount of money that a Maine Clean Election Act candidate must return to the state if the candidate has used public funds to purchase goods that could be converted to the candidate's personal use after the election; and to increase the maximum amount of seed money contributions which gubernatorial candidates seeking Maine Clean Election Act funding could receive during the qualifying period from \$50,000 to \$150,000.

The Chapter 3 rules may be amended to be consistent with statutory changes enacted in the First Regular Session of the 124th Legislature. If necessary, the Commission may propose additional rule amendments to improve the administration of the Maine Clean Election Act program or to clarify existing procedures.

EXPECTED SCHEDULE FOR ADOPTION: No later than May 2009.

AFFECTED PARTIES: Prospective candidates for the office of Governor, State Senator, or State Representative, and the general public.

CONSENSUS-BASED RULE DEVELOPMENT: None expected.